

BEFORE THE  
OFFICE OF ADMINISTRATIVE HEARINGS  
STATE OF CALIFORNIA

In the Matter of:

PARENTS on behalf of STUDENT,

v.

SAN CARLOS ELEMENTARY SCHOOL  
DISTRICT.

OAH CASE NO. 2009050786

**DECISION**

Administrative Law Judge Rebecca P. Freie, Office of Administrative Hearings (OAH), heard this matter in San Carlos, California, September 9 and 10, and September 14 through 17, 2009.

Attorney Christian Knox represented Student. Student was present for part of the first day of hearing and testified. Student's mother (Mother) was present throughout the hearing. Student's father (Father) was present for part of the hearing.<sup>1</sup>

Attorney Kathryn Alberti represented San Carlos Elementary School District (District). Mary Jude Doerpinghaus, Coordinator of Special Education for the District, was present throughout the hearing.

Student filed the request for due process hearing (complaint) on May 20, 2009. Continuances were granted on June 25 and August 12, 2009. Following the close of testimony and receipt of evidence on September 17, 2009, a continuance was granted to October 8, 2009, to permit the parties to file written closing arguments. Upon receipt of the closing arguments on October 8, 2009, the record was closed, and the matter was submitted for decision.<sup>2</sup>

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<sup>1</sup> Student's parents are collectively referred to as "Parents."

<sup>2</sup> The Student's written argument has been designated as Student's Exhibit 76 and the District's closing argument has been designated as District's Exhibit 50.

## ISSUES<sup>3</sup>

1. Did the District deny Student a free appropriate public education (FAPE) by failing to fulfill its child find obligations from May 21, 2007, through January 22, 2009?<sup>4</sup>
- 2) Did the District deny Student a FAPE from May 21, 2007, through January 22, 2009, by failing to:
  - a) Assess Student in all areas of suspected disability until November 18, 2008?
  - b) Make a referral for a mental health assessment and services?
  - c) Find Student eligible for special education services?
  - d) Offer Student an educational placement and services that would meet her unique needs?
  - e) Prepare measurable goals in all of Student's areas of need?
- 3) Did the District deny Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year, by failing to:
  - a) Properly assess Student in all areas of suspected disability pursuant to Education Code section 56320?
  - b) Make a complete referral for mental health services?
  - c) Find Student eligible for special education services under the qualifying condition of autistic-like behaviors?
  - d) Offer Student an educational placement and services to meet her unique needs in the least restrictive environment (LRE)?
  - e) Report accurate baselines for goals and prepare goals in all areas of need?

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<sup>3</sup> The issues have been reorganized and reframed for clarity from those in the Order Following Prehearing Conference. In addition, Student initially pled claims for the 2005-2006 and entire 2006-2007 school years, but dismissed these claims without prejudice prior to the commencement of the hearing.

<sup>4</sup> Generally, a complaint must be filed within two years from the date a student claims a school district failed to comply with the provisions of the Individuals with Disabilities Education Act (IDEA). The complaint in this matter was filed on May 20, 2009, so the claims period in this matter commenced two years prior to that date.

## CONTENTIONS

Student contends that the District failed to fulfill its child find obligations, as imposed by the IDEA, from May 21, 2007, through January 22, 2009, because it did not begin to assess her for special education eligibility until after November 18, 2008. Student claims that she had great difficulty completing assignments and learning the curriculum at school because she suffers from Asperger's syndrome (AS), obsessive-compulsive disorder (OCD), anxiety and depression. Therefore, her signs of anxiety and other impairments should have been observed by District personnel, and she should have been referred for assessment. Student claims that a neuropsychologist who assessed her in 2005, issued a report that recommended that she be evaluated for special education services, and this report was given to the District in 2005. Student also claims that a letter from the same neuropsychologist, dated March 26, 2008, that recommended that Student be assessed for mental health issues, was given to the District in March or April 2008. In addition, Student claims that Parents made repeated requests to the District that Student be assessed. Therefore, for all of these reasons, Student asserts that the District failed to meet its child find obligations by failing to refer her for assessment. Student also contends that District personnel intentionally changed her grades and school attendance records so that it appeared that she was having fewer problems in school than she was actually exhibiting.

Student argues that the District's failure to refer her for assessment until November 18, 2009, denied her a FAPE. Had she been assessed earlier, Student contends, she would have been found eligible for special education due to her co-morbid conditions of AS, OCD, anxiety and depression. Student claims that the District denied her a FAPE prior to January 22, 2009, because the District did not find her eligible and provide her with an individualized educational program (IEP) designed to meet her unique needs. In addition, Student claims that the District should have recognized her need for mental health services, and made such a referral before it did so on January 9, 2009.

Student claims that the District denied her a FAPE because its IEP of January 22 and February 5, 2009, was based on assessments that did not comply with the law because too few, or inappropriate testing instruments were utilized, and in some instances, test results were incorrectly scored, or otherwise flawed. Student contends that the District's referral for mental health services was incomplete, which is why the county mental health agency denied these services. In addition, Student believes that the District should have found her eligible for special education services under the category of autistic-like behaviors. Finally, Student asserts that the District's offer of placement and services at the IEP team meetings on January 22, 2009 and February 5, 2009, did not provide her with a FAPE. She also disagrees with the proposed goals, and the baselines used to formulate those goals.

Student asks that the District reimburse her parents for the costs of her placement from February 2009 to the end of the regular 2008-2009 school year, at Stanbridge Academy (Stanbridge), a private school for children with mild to moderate disabilities. Further, Student requests reimbursement of payments to her private therapist, Paula Jacobsen, LCSW, and reimbursement of the cost of a compensatory education summer class at Stanbridge. She

is also asking for 35 hours each of individual tutoring, speech and language therapy, and occupational therapy as compensatory education. Lastly, she is asking the District to fund an independent educational evaluation by an assessor of Parents' choosing.

The District contends that modifications were formulated at student study team (SST) meetings from December 6, 2005, to March 10, 2008, and teachers implemented these modifications which enabled Student to make educational progress. On March 10, 2008, a Section 504 of the Rehabilitation Act of 1973 Plan (504 Plan) was formulated, and on August 21, 2008, the 504 Plan was updated. The District contends that modifications in the 504 Plan were sufficient to enable Student to access the curriculum and gain educational benefit, and Teachers implemented these modifications. The District contends that District personnel did not see student emotionally distraught at school. In addition, Student's teachers found her to an active participant in class, and she understood the grade-level curriculum, as she received mostly A and B grades. The District believes that it fulfilled its child find obligation, and had no reason to assess Student prior to November 18, 2008. In addition, the District contends that although Mother testified that she had provided the school with various privately obtained assessments and letters from professionals treating Student that recommended that Student be assessed and/or offered an IEP, the District never received these assessments or letters. Further, the District contends that Parents never asked that Student be assessed for special education eligibility. Therefore, the District argues, any failure of the District to either assess Student sooner, or assess her differently, is due to this parental lack of cooperation. The District argues that it satisfied its child-find obligations from May 21, 2007 through January 22, 2009, and did not deny Student a FAPE. In addition, the District contends that it made a referral for mental health services.

The District claims that its offer of placement and services at the IEP meetings of January 22, 2009, and February 5, 2009, was appropriate, as were the assessments it conducted, and the goals drafted for those IEP meetings. The District believes that placement of Student at Stanbridge is inappropriate because all of the students at Stanbridge have special needs, and Student has been removed from the least restrictive environment (LRE) offered by the District's proposed placement. The District does not believe it should reimburse parents for Student's placement at Stanbridge, or the services of her psychotherapist. Further, the District does not believe it should be required to provide any compensatory education to Student because it has either provided her with a FAPE, or offered her a FAPE for the time periods in question.

## FACTUAL FINDINGS

### *Jurisdiction*

1. Student and Parents have resided in the District since at least 2000. Student is now 14 years of age, and began attending Tierra Linda Middle School (TL) in the District in 2005. She attended TL until November 8, 2008, although she did not disenroll from TL until the beginning of February 2009. The parties agree that Student has unique needs that now make her eligible for special education.

### *Child find*

2. Under IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. The duty is not dependent on any action or inaction by parents; a district must actively seek out individual students with exceptional needs who reside in the district. Student contends that she presented as a student with disabilities in the school setting who required special education from May 21, 2007, to January 22, 2009. Therefore, Student contends that the District had an obligation to take steps to have her assessed for special education services. Failure of the District to do so resulted in a denial of FAPE.

### *2005 Tsou report*

3. Student began seeing a neuropsychologist, for psychotherapy during the summer of 2005. In October 2005, Amy Tsou, Ph.D., Student's therapist conducted a thorough neuropsychological evaluation of Student<sup>5</sup> Student was diagnosed as having Pervasive Developmental Disorder, Not Otherwise Specified (PDD NOS), with Asperger's features. Dr. Tsou issued a 16-page report (2005 Tsou Report) describing in detail the results of testing, and containing several recommendations. The central recommendation was that Student receive an IEP to address her academic needs, including resource specialist program (RSP) services. Other recommendations in the report concerned particular methods of teaching, various classroom accommodations, as well as home and treatment recommendations. Classroom accommodations included: 1) seating at the front of the class and away from distractions; 2) extended time on tests and assignments; 3) frequent breaks if necessary; 4) adult assistance to help Student maintain focus; 5) flexible due dates for homework assignments; 6) copies of teacher's notes (due to difficulties with note-taking); 7) pairing with a peer to assist with socialization; 8) mentoring from a teacher or school counselor; 9) seating with "students who have good prosocial and organizational skills[;]"

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<sup>5</sup> Dr. Tsou is a licensed psychologist with a doctorate in clinical psychology with an emphasis in child and family psychology. She obtained her license as a clinical psychologist in August 2002. She has been employed by the Permanente Medical Group, Inc. (Kaiser) in Redwood City since 2002. Dr. Tsou spends half of her time at Kaiser conducting neuropsychological assessments, primarily of children and adolescents, and the other half providing individual, family and group psychotherapy services.

and 10) explicit teaching about identifying common themes in new information and how to generalize knowledge. Dr. Tsou's report was sent to Parents.

4. Mother testified that she gave the 2005 Tsou report to Vivian Garlick, a school counselor at TL, in December 2005.<sup>6</sup> However, Mother could not remember whether she gave the report to Ms. Garlick before an SST meeting in December 2005, or at some time during or after that meeting. Several witnesses, including Ms. Garlick, and the TL school psychologist, Sharon Foster, testified persuasively that they had never seen the report until immediately before, or during the hearing in September 2009. Hundreds of pages of documents were admitted into evidence at the hearing. These documents included notes from SST meetings, and 504 Plan meetings. Although most of the recommendations from the 2005 Tsou report were gradually included as modifications for Student as the result of SST meetings, from December 5, 2005, to March 10, 2008, and included as accommodations in 504 Plans developed March 10 and August 21, 2008, none of the documents from those meetings contain any reference to the Tsou report and recommendations. In addition, evidence included dozens of pages of emails between Parents, especially Mother, and school personnel from the beginning of the 2006-2007 school year, through May 2009. The 2005 Tsou report is never mentioned in any of these documents. The evidence established that Mother never gave the report to school personnel.

*May 21, 2007 through the end of the 2006-2007 school year*

5. An SST meeting was held on December 6, 2005. Mother, Ms. Garlick, the vice principal, and Student's teachers attended this meeting. At this SST meeting, Mother told the team that Student had recently been diagnosed with "Pervasive Developmental Disorder with mild Asperger's."

6. The team recommended the following modifications for Student: 1) extended time for testing; 2) use of a "water sign" if Student needed a break during class; 3) relaxation techniques; 4) teachers to inform Mother if new concepts were introduced; 5) guided study with a buddy for math; and 6) Mother would communicate with teachers if Student mastered particular work. Mother testified that she requested an IEP or assessment at every SST meeting, including this meeting. However, there was no mention in the SST Summary of an IEP or mention of any need for the District to conduct an assessment of Student. Mother testified that during this school year she kept asking about whether an IEP was necessary, and wanting to learn more about what an IEP was. However, this testimony was not credible as Student's sibling has AS, and has had an IEP since 2000. Further, Ms. Garlick testified persuasively that Mother did not request an IEP or assessment of Student at this meeting, or at any other time during this school year.

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<sup>6</sup> Ms. Garlick has been a school counselor at TL since 2001. She has a Bachelor of Arts degree with a major in psychology and a minor in education. She also has a Master of Science degree in Marriage and Family Therapy and School Counseling, and has held a California pupil personnel services credential since 2001. She also is licensed as a licensed Marriage and Family Therapist (MFT) in California.

7. Teachers utilized the modifications developed at the SST meeting of December 6, 2005, throughout the 2006-2007 school year, and the evidence established that Student's needs were met with these modifications. Mother testified that from May 21, 2007, to the end of the 2006-2007 school year, Student did not exhibit any significant problems with her school work. At the end of the school year, Student received three As, two Bs and a C+ in her classes. The evidence established that Student's educational needs were met by use of the modifications from the December 6, 2005, SST during the period from May 21, 2007, to the end of the 2006-2007 school year. There was no evidence that Parents requested assessment of Student from May 21, 2007, to the end of the 2006-2007 school year.

*The 2007-2008 school year*

8. At the beginning of the 2007-2008 school year, Student's seventh-grade year, Mother advised Ms. Garlick by email that Student had been "professionally tested and found to have nonverbal learning [*sic*], OCD and Anxiety disorder."<sup>7</sup> Parents did not provide any outside evaluations of Student, including the 2005 Tsou report, to the District at this time, or any other time during this school year. Ms. Garlick then suggested that an SST meeting be scheduled to consider a 504 Plan.

9. On October 19, 2007, another SST meeting was held. Mother, Ms. Garlick and Student's teachers attended this meeting. The team did not have access to any reports from professionals who had either assessed or provided services to Student. The SST summary said that Student had a "non-verbal learning disorder . . . mild OCD . . . [and] anxiety[.]"<sup>8</sup> The Summary noted that Student was taking Prozac and periodically saw a psychiatrist. Student had missing homework, and "absent work [was] not being made up." Also, big projects in science and history were looming. Modifications in place at the time included use of a large whiteboard at home, doing just one problem at a time, attending study hall and using a stress ball. There was also a notation, "check Schoolloop."<sup>9</sup> The new modifications or "action plan" called for Student to: 1) cover-up questions on a test so she would just concentrate on one at a time; 2) Mother to write a note when Student was overwhelmed by work; 3) use of a "guided study sheet"; and 4) use of a "homework folder[.]"

10. Mother testified that she requested an IEP at this meeting, but the evidence did not establish this. There was no mention of a 504 Plan, assessment, or IEP in the notes from

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<sup>7</sup> There was no evidence other than Mother's testimony that Student was ever formally diagnosed as having OCD. Dr. Tsou testified that Student did have some ritualistic behaviors that were manifestations of her AS.

<sup>8</sup> There was no evidence during the hearing that student had been diagnosed with a "non-verbal learning disorder."

<sup>9</sup> Schoolloop is TL's computerized communication system which allows students and parents to track homework that is assigned, and also keeps track of a student's grades in each class.

the meeting. Ms. Garlick testified persuasively that Mother did not request an IEP or assessment at this meeting, and none of the emails between Parents and District personnel for the 2007-2008 school year mentioned any request for an IEP or assessment.

11. Student's anxiety at home increased at the beginning of 2008. Mother met with Ms. Garlick in February 2008, to discuss "recent testing results for [Student]," but there was no evidence about what "testing results" were discussed. Ms. Garlick testified persuasively that she saw no reports of testing of Student during that school year. The evidence did not establish that Mother requested an IEP or assessment of Student at this meeting.

12. Another SST meeting was convened on March 10, 2008. Dr. Lesley Martin, Principal at TL, all of Student's teachers, Mother, and Ms. Garlick attended this meeting. There was discussion during this meeting about whether Student could benefit from a formal 504 Plan at this time, or if she needed an IEP. Mother testified that she did not request an assessment or IEP at this meeting. The evidence established that Mother did not request either an assessment or an IEP during the SST meeting on March 10, 2008.

13. At the March 10, 2008 meeting, the team agreed that Student's needs could be met with a 504 Plan, and one was drafted. In addition to the previous accommodations, the team formulated new accommodations. These included: 1) giving Student extra time on tests and homework; 2) excusing missed assignments; 3) taking tests when she was ready to do so; 4) taking tests in a quiet setting; and 5) allowing teacher to modify homework, and grade modified assignments accordingly. The 504 Plan reflected that test and school anxiety were the reason for the 504 Plan. It was also noted that Student had been diagnosed with AS by Dr. Tsou in December 2007.

14. On March 4, 2008, Mother executed a release of information form from Kaiser permitting school personnel to provide Dr. Tsou with information. However, the release does not permit Dr. Tsou to provide information to the District. On March 26, 2008, Dr. Tsou wrote a letter to Parents in which she recommended that Student be given a psycho-educational assessment due to increased school anxiety, and that Student be referred for mental health services. Although Mother testified that she provided a copy of this letter to Ms. Garlick shortly after it was written, Ms. Garlick testified persuasively that she never received this letter, and Mother did not discuss the recommendations of this letter with her. In addition, there is no mention of this letter in any emails between District personnel and Mother during this school year. Therefore, the evidence established that Parents did not provide a copy of the letter of March 26, 2008, to the District, nor did they discuss this letter with District personnel during this school year.

15. Student and Mother testified that towards the end of the 2007-2008 school year, Student was going into the restroom during class and crying for 20 or 30 minutes at a time several times a month. On occasion she would call Mother on her cell phone and ask to be picked up from school. According to Mother, this was happening approximately once every other week. However, Ms. Garlick testified persuasively that she had no recollection

that either Student or Mother reported these episodes of crying and leaving school early to her during the 2007-2008 school year. One of Student's teachers testified that Student would sometimes be crying "a bit" when she would ask to be excused to go see Ms. Garlick, and he would always release her from class to go see her. The other two teachers who testified about Student during this school year never saw her crying. The evidence did not establish that District personnel were aware of Student having lengthy crying spells at school, nor did the evidence establish that the District should have been aware of these incidents.

16. During the 2007-2008 school year Mother occasionally emailed Ms. Garlick that Student was particularly anxious or depressed, or had been emotional at home in the afternoon or night before. Ms. Garlick would then call Student to her office and "check-in" with her to see how she was doing. Student also self-referred herself to Ms. Garlick on occasion. Ms. Garlick testified that Student was not visibly upset when she would see her during the school day. Ms. Garlick was particularly persuasive in this regard because she is a licensed marriage and family therapist, and the evidence established that she had a very close relationship with Student dating back to 2005. The evidence established that although Student exhibited occasional anxiety at school, it was not different or more excessive than that exhibited by other middle school children.

17. Student's seventh grade teachers provided her with the modifications in the 504 Plan of March 10, 2008. Some teachers began providing her with these modifications in the fall of 2007.<sup>10</sup> Student's final grades were one A, two Bs and two Cs. Student's grades accurately portrayed her knowledge of the curriculum in each of her classes, based upon her performance on tests and quizzes, and classroom participation. Student made academic progress during the 2007-2008 school year.

18. Several witnesses, including Ms. Garlick, Sharon Foster, the school psychologist, Dr. Tsou, and Cheryl Ambler, Ph.D., a neuropsychologist retained by Parents as an expert witness, testified about social and emotional difficulties faced by many middle school students. Ms. Garlick and Student's teachers testified credibly that Student did not demonstrate signs of emotional turmoil or disturbance during the 2007-2008 school year that caused them concern. Although many emails were sent by Mother to Ms. Garlick concerning Student's emotional scenes at home, this behavior was not replicated in the school environment. The evidence established that the District did not fail its child find obligation to Student during the 2007-2008 school year.

*Summer of 2008 school year to January 22, 2009*

19. The evidence established that on one or two occasions between the late spring of 2008 and November 8, 2008, Student expressed suicidal ideation to Parents. Neither Mother nor Ms. Garlick were able to be more specific about the dates. Student began seeing a therapist, and Ms. Garlick made a "contract" with Student that she would not harm herself.

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<sup>10</sup> OAH does not have jurisdiction over 504 Plans, and no finding is made as to the sufficiency of the modifications.

Student did not express suicidal ideation to Ms. Garlick or any other school personnel during this time.

20. During the summer of 2008, parents sent an email to Ms. Garlick and Dr. Martin saying that Student was very anxious about the upcoming school year. As a result, a 504 Plan meeting was convened on August 21, 2008, and Student's 504 Plan was modified. Student's teachers for the upcoming school year and two teachers from the previous school year attended the meeting, as did Parents and Ms. Garlick. The 504 Plan notes reflect that executive functioning is a challenge for Student. Added to the 504 Plan was an accommodation that Student be provided copies of teachers' notes because she had difficulty with note-taking in her classes.

21. At the meeting of August 21, 2008, it was explained that the accommodations from the 504 Plan of March 10, 2008, remained in effect, and they were explained to the teachers. As a result of the 504 Plan meeting on August 21, 2008, Student's teachers for the 2008-2009 school year understood before the school year began that 1) Student would get modified assignments, such as being required to do only half of her math homework; 2) Student would be excused making up missing assignments; 3) Student would only be graded on the work that was actually returned to the teachers, as well as quizzes, tests and classroom participation; 4) teachers would provide Student with their class notes; 5) Student would be allowed to take tests when she was ready; 6) Student would be given extended time to take tests, and could take them in a quiet setting; and 7) Student would be excused from class to see Ms. Garlick upon request.

22. Student and Mother both testified that Student was anxious and depressed in school, and would often go into the restroom and cry for 20 or 30 minutes at a time. Sometimes she would call mother to come pick her up early from school. Student's teachers at TL for the 2008-2009 school year testified credibly that they never saw Student crying. Student would occasionally ask to be excused from class to see Ms. Garlick. When this occurred, Student did not appear to be anxious or upset, and Student never cried in Ms. Garlick's office.

23. Between August 25, 2008, and October 22, 2008, there were seven series of email exchanges between Mother and Ms. Garlick concerning Student's anxiety about school and emotional breakdowns at home. Mother emailed Ms. Garlick that Student had a difficult time during the previous afternoon or evening. Ms. Garlick checked with Student to make sure she was feeling all right, and then promptly responded to these emails. At times Student came to see Ms. Garlick on her own. At these times, Ms. Garlick suggested strategies for Parents to employ at home when Student was anxious. When Ms. Garlick met with Student, they would discuss ways that Student might handle difficult assignments so she would not be anxious.

24. On the night of September 15, 2008, Mother emailed Ms. Garlick that Student was anxious and depressed, in part because she was stressed about making up the work she had missed the previous week when absent for two days. Then Mother wrote, "At what point

would you recommend the possibility of an IEP as I am sure that the teachers are doing the best they can at this point.” Ms. Garlick responded that she was gathering data on the 504 Plan to see if Student could benefit from the additional support an IEP would provide, and she was contacting Student’s teachers and the school psychologist to get more information. The evidence did not establish that this email was a request for assessment. Mother did not follow up with other emails asking for an assessment or IEP. Ms. Garlick contacted teachers regularly to make sure Student was making progress in their classes, and she was. She reported to Mother that Student was doing well.

25. Beginning on September 24, 2008, and continuing to October 22, 2008, Mother sent several emails to Ms. Garlick mentioning that Student had seen a psychiatrist or psychologist the previous day. On more than one occasion, Ms. Garlick asked Mother to sign a release of information so Ms. Garlick could talk to the mental health professional. There is no evidence that Mother signed any releases during this time period.

26. On September 29, Mother reported that Parents were now consulting with a “neuro-psychiatrist,” and referred to her as “Dr. Paula Jacobsen” (Ms. Jacobsen).<sup>11</sup> Student began seeing Ms. Jacobsen October 14, 2008. More than once, Ms. Garlick asked Mother to arrange for her to speak with Ms. Jacobsen, but Ms. Jacobsen never contacted Ms. Garlick. Mother did not sign a release for District personnel to speak to Ms. Jacobsen until December 9, 2008.

27. The emails from Mother to District staff from September through November 2, 2008, establish that during the first part of the 2008-2009 school year, Student experienced intermittent periods of crisis, interspersed with periods lasting a week or more when Mother did not contact the school. Further, when Mother emailed teachers with concerns about Student’s anxiety about a specific class or assignment, teachers responded within a day, and were eager to help. Finally, the evidence established that Student was not having emotional breakdowns in the classroom or on campus.

28. On November 3, 2008, Mother wrote an email to Ms. Foster, the school psychologist. Mother wrote that “[Student] fits neither mainstream or [*sic*] special education.” She asked what resources were available in the District for girls with AS. She did not ask for an assessment or talk about an IEP. The following day, Ms. Foster responded to Mother and asked Mother to provide her with the reports from professionals concerning Student. Mother stated she would do so, but the evidence established that Ms. Foster did not receive any reports from Mother until November 18, 2008, after Student stopped attending school at TL.

29. On November 12, 2008, Mother emailed the principal of TL, Dr. Martin, that Parents were taking Student out of school due to her emotional state. Mother acknowledged

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<sup>11</sup> Ms. Jacobsen testified that she is a licensed clinical social worker (LCSW), not a neuropsychiatrist, with a master’s degree in social work.

that all of the teachers had accommodated Student's needs. A 504 Plan meeting was scheduled for the morning of November 18, 2009. November 8, 2008, was the last day Student physically attended school.

30. The 504 Plan meeting of November 18, 2008 was attended by Ms. Garlick, Dr. Martin, Mother and two of Student's teachers, Marilyn Wallenstein and Daniel Castillo. Ms. Wallenstein was Student's math teacher, and Mr. Castillo was her history teacher. Student's poorest grades were in these subjects. At this meeting, Mother produced Dr. Tsou's March 26, 2008 letter recommending assessment. Student was referred for a special education assessment as a result of this meeting.

31. Student's three academic teachers during the fall of 2008, testified credibly that prior to November 8, 2008, Student was an active participant in class, was making educational progress, and understood the curriculum. She had two Bs and two Cs when she was graded for the first trimester, and passed the class where she worked as a student aide. Her remaining period was study hall.

32. The evidence established that the District did not fail to meet its child-find obligations from May 21, 2007, to January 22, 2009. Student's final grades for both the 2006-2007 and 2007-2008 school years were primarily As and Bs, with only three Cs. These grades were accurate reflections of Student's work and abilities, based on the work she completed, including tests and quizzes. Although Mother reported that Student exhibited increasing anxiety during the 2007-2008 school year, and at the beginning of the 2008-2009 school year, the evidence established that this anxiety was exhibited primarily at home, rather than at school. Student's teachers for the 2007-2008 and the beginning of the 2008-2009 school year, all testified credibly that Student was a good student, appeared to enjoy their classes, was an active participant, and fit in well with other students. They also testified credibly that while Student showed occasional anxiety in class, it was not different than what was exhibited by peers.<sup>12</sup>

33. Although Student claims that she was denied a FAPE because the District failed to meet its child-find obligations, the evidence established that Parents did not provide information to the District that would have put the District on notice earlier that Student might have far more serious problems than indicated by her day-to-day behavior in school. Parents never provided the 2005 Tsou report to the school. Parents did not provide Dr. Tsou's March 26, 2008, letter to the District until the SST meeting on November 18, 2009. There was clear evidence that although Ms. Garlick made multiple requests to speak to professionals who Mother told her were treating Student, Mother did not facilitate that communication. This lack of cooperation by Parents may have resulted in the District having a much more positive view of Student's social-emotional condition than it would have had if it had been provided with this information in a timely fashion. Therefore, the District

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<sup>12</sup> Student also claimed that the District changed her attendance records to reflect better attendance, but the evidence did not establish this claim.

fulfilled its child-find obligation, based on the information it possessed, from May 21, 2007, to January 22, 2009.

*Denial of FAPE May 21, 2007, to January 22, 2009*

34. The District met its child find obligation from May 21, 2007, to January 22, 2009. Therefore, it had no duty to assess Student, find her eligible for special education, or offer her a placement, services and goals.

*Failure to make a mental health referral May 21, 2007, to January 22, 2009*

35. Based on the results of a pupil's special education assessments, an IEP team may refer a pupil who is suspected of needing mental health services, and meets all of the legal criteria, to a community mental health service for a mental health assessment. Student contends that the District was obligated to make a referral to the San Mateo County's community mental health agency (DMH) for a mental health evaluation and failed to do so.

36. The statutory scheme requires that a student referred for a mental health assessment have an IEP. Although Student did not have an IEP, and the District had no obligation to make a mental health referral, on January 9, 2009, Ms. Doerpinghaus, coordinator of special education for the District sent a referral for a mental health assessment of Student to DMH. On January 22, 2009, DMH declined to assess Student because there was no evidence that Student had an IEP.<sup>13</sup> Student did not establish that the District had any obligation from May 22, 2007 until January 22, 2009, to refer her to DMH.

*Placement and services November 8, 2008, to January 22, 2009*

37. As discussed in Factual Finding 34, the District was not obligated to provide Student with a FAPE, including placement and services, from November 8, 2008, to January 22, 2009, because she was not eligible yet for special education, and she did not have an IEP. At the SST meeting held on November 18, 2008, the team agreed that Student should be assessed to determine whether she was eligible for special education services. Although not legally obligated to do so, the team then discussed options that would permit Student to return to school pending the completion of the assessments by the District. These options included: 1) a shortened school day; 2) placement in an RSP classroom for part or all of the day; 3) pass/no pass grades, rather than numeric or letter grades; and 4) a one-to-one aide for part of the day to address the concerns from Mother that Student was suicidal.

38. Mother initially seemed enthusiastic about the proposed plan to return Student to TL pending completion of the assessment and an IEP. She visited the RSP class on November 25, 2008 to conduct an observation, and sent an email to Ms. Foster saying she found the RSP class "very impressive." However, Mother sent an email to Ms. Foster on

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<sup>13</sup> DMH was not named as a party, and no finding is made as to whether DMH erred in declining to assess Student.

December 1, 2008, that made it clear that Parents would not permit Student to return to TL under any conditions prior to the IEP being completed.

39. Following receipt of the December 1, 2008 email from Mother declining the District's proposed placement of Student pending assessment, Dr. Martin offered to arrange for a teacher to come to the home to provide in-home instruction to Student as a home-hospital placement. Again, the District was under no obligation to provide this service. However, when the home-hospital teacher came to Student's home on December 17, 2008, Mother and Student were unhappy with the teacher. The teacher thereafter became ill and did not return. Following the commencement of school after the winter break on January 6, 2009, Dr. Martin arranged for another teacher to provide home-hospital services. However, Mother either did not respond to numerous emails from the teacher trying to set up times to come to the home, or when Mother responded, she later canceled the appointments. After the visit from the first teacher in December, Student refused to see anyone else. Student attended Stanbridge in December 2008 and January 2009, and may have also attended during November 2008.

40. The District was not required to provide Student with a FAPE prior to eligibility being established, so the District did not deny Student a FAPE from November 18, 2008, to January 22, 2009.

*Denial of FAPE after January 22, 2009*

*Did the District conduct an appropriate assessment?*

41. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic information about the student. Student was administered a psycho-educational assessment by Ms. Foster, an academic assessment by Susan Johns, and a speech and language assessment by Mitzi Geller. Student contends that the District's psycho-educational and academic assessments were not "adequate."<sup>14</sup>

42. Ms. Foster is a school psychologist who has been with the District for 12 years. She has a Bachelor of Arts degree in psychology and a Master of Science degree in school psychology. In addition, she has completed all of her course work for a doctorate in education in school psychology, but she has not completed her dissertation. She holds a Pupil Personnel Services Credential, and is also trained as a Behavior Intervention Case Manager. Ms. Foster has conducted over 1,000 psycho-educational evaluations.

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<sup>14</sup> Student did not challenge the speech and language assessment.

43. Ms. Foster began her psycho-educational assessment of Student on December 9, 2008. Ms. Foster reviewed a November 24, 2008 letter from Dr. Tsou to Parents that recommended that Student not attend regular classes at TL. Ms. Foster also reviewed a December 4, 2008 report from Ms. Jacobsen concerning her observation of Student attending Stanbridge, as well as a follow-up report from Ms. Jacobsen dated December 12, 2008. Ms. Foster never saw the Tsou report from 2005, although she was provided with the March 26, 2008 letter and three pages of numerical scores of the assessment tools administered to Student in 2005.

44. Ms. Foster administered the Woodcock-Johnson III Tests of Cognitive Abilities (WJ III) to Student. Student's overall cognitive abilities were in the average range, for the most part, with superior levels in the areas of Verbal Ability and Comprehension-Knowledge, and lower ability in the area of Cognitive Efficiency. Student's scores in the Executive Cluster were in the high average range. Student was also administered the Developmental Test of Visual-Motor Integration-5th Revision (VMI) to assess visual and motor skills. Student's scores on the VMI were in the average range.

45. Ms. Foster assessed Student's social-emotional functioning with the Behavioral Assessment Scale for Children (BASC-II). Parents were given the Parent Rating Scales section to complete, and several of Student's teachers and Ms. Garlick were given the Teacher Rating Scales to complete.<sup>15</sup> Most of the Parent ratings scored Student's behaviors in the clinically significant range, with several others in the at-risk range. Only two areas, aggression and conduct, showed Parent scores in the average range. Ms. Garlick's scores reflected that Student was in the at-risk range in the area of anxiety. However, the remainder of her scores showed Student in the average range. Two of Student's teachers completed the Teacher Rating Scale. Both scored Student in the average range in most areas, except there were some scores in the at-risk range.<sup>16</sup> Student was also given the BASC-II Self-Report to complete, and she scored herself in the at-risk range only in the areas of anxiety, interpersonal relations and self-reliance.

46. Ms. Foster also administered the Sentence Completion Test to Student. Student's responses reflected depression and suicidal ideation. Ms. Foster had Ms. Garlick and Mother complete the Asperger Syndrome Diagnostic Scale (ASDS). Mother's scores reflected that it was very likely Student has AS, while Ms. Garlick's scores showed that it was very unlikely. Therefore, Ms. Foster determined, as the evidence in this case established, that Student's AS behaviors were much more prevalent at home than at school. Ms. Foster also had Parents complete a developmental history, and interviewed Mother, Student's teachers, Ms. Johns and Ms. Geller. She also interviewed Student. She noted that Student engaged in reciprocal conversation, made eye contact, and did not focus on

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<sup>15</sup> The BASC-II scores responses in such a way as to reflect whether a child's behavior in a specific domain is "Average," i.e., typical, "At-Risk," i.e., a child is at-risk for developing problems in that domain, or "Clinically Significant," i.e., child is exhibiting a high level of maladjustment that requires intervention.

<sup>16</sup> Most of these scores were from Student's science teacher. Ms. Foster commented that his at-risk scores were due to numerous responses that he had "never" observed certain behaviors.

unimportant details during the testing. In addition, she observed Student often with a group of friends on the playground at TL, when Student was still attending school. Student reported being involved in playing computer games with others on line, and participating in a student chat-room frequented by students at TL. Ms. Foster also reviewed Student's school records and the reports noted in Factual Finding 43.

47. Dr. Ambler is a neuropsychologist retained as an expert witness on behalf of Student. Dr. Ambler is a licensed psychologist, specializing in pediatric neuropsychology. She has a Bachelor of Arts degree in Sociology, with a minor in psychology, and a Master of Arts degree in Marriage, Family and Child Counseling. Dr. Ambler was awarded her Ph.D. in Clinical Psychology in June 1998, and did a post-doctoral fellowship from 1998 to 1999. Dr. Ambler has assessed approximately 300 children, and she testified about the inadequacies she perceived in Ms. Foster's assessment. Dr. Ambler had never met Student, although she was scheduled to assess her in November 2009.

48. Dr. Ambler testified that the findings of the 2005 Tsou report were important to consider when a subsequent assessment was conducted. However, the evidence established that Ms. Foster did not have access to the 2005 Tsou report. In addition, Dr. Tsou's testing had been conducted over three years before the District's testing and, as a result, the 2005 results were of questionable value. Dr. Ambler also questioned Ms. Foster's use of the WJ-III to assess Student's cognitive abilities, and she testified that there appeared to be no testing to assess Student's executive functioning. Dr. Ambler also criticized Ms. Foster's use of the BASC to assess Student's social-emotional functioning, commenting that she would have supplemented the BASC with other test instruments. Finally, Dr. Ambler testified that Ms. Foster should have conducted observations of Student in the classroom and also during unstructured time, and obtained information from Student's teachers at Stanbridge. Dr. Ambler also criticized the use of the ASDS to assess whether or not Student had AS.

49. Dr. Ambler's criticisms of Ms. Foster's 2008 assessment were not persuasive. Ms. Foster testified persuasively that certain subtests in the WJ-III and the BASC could be used to assess executive functioning, and she had used them to do so. In addition, Ms. Foster conducted the Sentence Completion Test, which is a projective instrument, to supplement the findings of the BASC in the area of social-emotional concerns. Also, Ms. Foster conducted teacher, parent and Student interviews, which are also effective assessment tools ignored by Dr. Ambler. In regards to the failure of Ms. Foster to conduct classroom observations of Student at Stanbridge, and to interview Student's teachers at Stanbridge, the evidence established that Mother told Ms. Foster that Student was only receiving tutoring at Stanbridge. In addition, Mother discouraged Ms. Foster from contacting anyone at Stanbridge. Finally, although Dr. Ambler testified at length about additional testing she would do if she was evaluating Student, her testimony was not persuasive that the District should have conducted further tests. Dr. Ambler is a neuropsychologist, and in that capacity she would conduct an evaluation of how Student functioned in all aspects of her life. On the other hand, a special education assessment by a school psychologist focuses properly on the Student's needs in the school environment. The evidence established that the psycho-

educational assessment by Ms. Foster was conducted in accordance with statutory requirements and accurately identified Student's unique needs.

50. Susan Johns is an RSP teacher at TL. She has been an RSP teacher for eight years. Ms. Johns has a Bachelor of Science degree in Communications, a Master of Arts degree in Mild/Moderate Special Education, and a credential in Mild/Moderate Special Education, as well as a Multiple Subject Credential. Ms. Johns conducted the academic assessment of Student, and administered both the Woodcock-Johnson Test of Achievement III (WJ Achievement III), and the Wechsler Individual Achievement Test–Second Edition (WIAT-II).

51. In the area of Mathematics, Student performed in the average range for children her age, although the evidence established that she did have some math deficits. She refused to complete one computation subtest. But Ms. Johns interviewed Ms. Wallenstein, Student's math teacher at TL, who told her that Student was performing well in her class, and seemed to be making progress. Student also performed well on both assessments in the area of Reading.

52. In Written Language, Student refused to complete a subtest on the WIAT-II requiring her to write a persuasive essay. This brought down her scores in this area, although generally her scores were in the average range.<sup>17</sup> Student's teachers reported to Ms. Johns that Student did not refuse to attempt work in their classes. Ms. Johns testified that she neglected to reflect a basal score on one subtest, but there was no evidence as to the impact this had, if any, on the results of this subtest. The evidence established that the assessment by Ms. Johns accurately reflected Student's academic achievements, and was conducted in accordance with statutory requirements.

53. The evidence established that the District's assessments were conducted by qualified personnel, and were administered properly. The District conducted appropriate assessments to determine if Student was eligible for special education, and to assist the IEP team to formulate a proposed IEP. There was no evidence that Student required a neuropsychological assessment for these purposes.

#### *Proper Mental Health Referral*

54. Factual Findings 35 through 36 establish that a student must have an IEP before a District can make a referral for a mental health assessment and services. The District made a referral on January 9, 2009, that was declined by DMH because Student did not have an IEP when the referral was made.

55. IEP team meetings were held on January 22, 2009, and February 5, 2009, at which time the District offered to make Student eligible for special education. However,

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<sup>17</sup> Ms. Johns attempted to reschedule this test item twice, but Parent told her that Student was unavailable.

Parents disagreed with the offer of placement and services, as well as the eligibility category the District proposed to establish Student's eligibility. They refused to sign any portion of the IEP, other than the section noting that they attended the meetings. Student therefore lacked an IEP, and it would have been futile for the District to make another referral to DMH.

*Eligibility criteria for Autistic-Like Behaviors*

56. Student contends that the District should have found her eligible for special education services as a child with autistic-like behaviors due to her condition of AS instead of under the category of other health impairments (OHI). The criteria for determining whether a child qualifies for special education under the category of autistic-like behaviors, include, but are not limited to the following characteristics:

- (1) An inability to use oral language for appropriate communication;
- (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood;
- (3) An obsession to maintain sameness;
- (4) extreme preoccupation with objects or inappropriate use of objects or both;
- (5) extreme resistance to controls;
- (6) Displays peculiar motoric mannerisms and motility patterns; and
- (7) Self-stimulating, ritualistic behavior.

If a student exhibits any combination of the above behaviors or other autistic-like behaviors, she may be eligible for special education services under the category for autistic-like behaviors.

57. The evidence established that Student exhibited many of the above autistic-like behaviors in the home environment. However, those behaviors were not observed in the school setting. For example, the finding that Student required pragmatic language therapy, pursuant to the speech and language assessment, does not demonstrate that Student met the first requirement, an inability to use oral language appropriately. The evidence established that generally Student did communicate orally in an appropriate manner in the educational setting. Therefore, Student did not demonstrate a combination of traits necessary to establish eligibility under the category of autistic-like behaviors.

58. Based on all of the testing and the interviews, Ms. Foster determined that Autistic-Like Behaviors was not an appropriate eligibility category, and the IEP team should consider eligibility criteria for Student to be OHI, based on her multiple diagnoses of AS, Anxiety Disorder, OCD and Depression. However, Ms. Foster testified that after the January 22, 2009 IEP team meeting, and the information shared in the meeting, she felt that Serious Emotional Disturbance (SED) might also have been an accurate eligibility category. Based on Ms. Foster's education, experience and demeanor while testifying, her testimony was persuasive.

59. As is determined in Factual Findings 60 through 69, the District's IEP team members proposed placement and services designed to meet Student's unique needs. Student did not establish that she needed different services than those the District offered to address autistic-like behaviors in the school setting. Therefore, the District's determination that Student was eligible for special education under the category of OHI, or SED, and not autistic-like behaviors, did not deny her a FAPE.

*Placement and services offered*

60. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District and not on the alternative preferred by the parents.

61. Federal and state law require school districts to offer a program in the LRE for each special education student. A special education student must be educated with nondisabled peers to the maximum extent appropriate and may be removed from the regular education environment only when the nature or severity of the student's disabilities is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. Placement must foster maximum interaction between students with disabilities and their nondisabled peers. The law favors mainstreaming, although it recognizes that a less restrictive setting may not always meet a child's unique needs, and for some students a more restrictive setting may be necessary to provide a student with a FAPE.

62. The test of whether a particular placement is the LRE for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district's proposed setting. Student contends that the District's February 2009 offer of placement and services did not meet her unique needs, and is asking that she be placed at Stanbridge. The District contends that its proposed placement is appropriate and in the LRE.

63. TL is a school with 600 students, most of them typically developing adolescents and pre adolescents. TL has at least two RSP classes with a low student-teacher ratio where students with disabilities are taught in accordance with their specific needs. Student's unique needs of anxiety and depression related to school require a placement where she will be less anxious, and will also learn to develop coping skills to decrease

anxiety. In addition, due to parent-reported suicidal ideation, Student requires monitoring for her safety during unstructured time.

64. The evidence established that Student received educational and non-educational benefits at TL when placed full-time in educational classes. She had friends at TL, and worked well with other students in her classes. Student was not disruptive in the general education environment, and did not impede other students in her classes from making educational progress; rather, she was an active, contributive participant in classroom discussions. Although Mother and Student testified that the District wanted to keep Student at TL, rather than pay for her to attend Stanbridge, the evidence established that the District complied with the law in making its offer of placement and services.

65. The District formulated an IEP proposal that took into account Student's unique needs. Student scored poorly in the area of pragmatic language, so she requires speech and language therapy. Student also has needs in the area of executive functioning. At the IEP team meeting on February 5, 2009, the District offered Student placement in an RSP class for three periods a day at TL, for writing, math and self-management skills, with 30 minutes per week speech and language group therapy to address pragmatic language. Student would also receive 30 minutes per week regular counseling services, plus an opportunity to speak to a counselor during the day if needed. Student would be placed in general education classes for the remainder of the day, although she could leave those classes if she needed to see a counselor, or needed a quiet space to gather herself. In the RSP class, Student would receive one-to-one or small-group instruction in academic areas. In addition, Student would be assessed for assistive technology to see if such equipment would enable her to complete her work in a timely manner, and provide her with additional self-confidence. Finally, due to indications that she had suicidal ideation, Student would be shadowed by a one-to-one aide during unstructured time.

66. Ms. Jacobsen testified that she did not believe Student would benefit from continued placement at TL, even under the auspices of the IEP proposed by the District. Ms. Jacobsen felt that Student required a complete change of school, not just a change of program at TL, and recommended placement at Stanbridge. However, Ms. Jacobsen never visited TL and was not familiar with the District's RSP program. Further, District personnel testified that its proposed placement was not restricted to TL; Student could be placed at the District's second middle school, Central Middle School.

67. Student began attending Stanbridge Academy in December 2008, and Parents formally enrolled her as a student at Stanbridge on February 3, 2009.<sup>18</sup> Stanbridge is a private school for children with mild to moderate disabilities. Approximately 100 students attend Stanbridge, ranging in age from kindergarten through high school. All of the students at Stanbridge have disabilities. Classes at Stanbridge are small with high adult to student ratios. Classroom materials and presentations may be modified so that each student is taught in the manner best suited to the student. Teachers utilize multi-modality methods to enhance

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<sup>18</sup> There was some evidence Student may have begun attending Stanbridge in November.

students' ability to learn the curriculum. Assistive technology is also used, and children are taught to self-advocate.

68. Although there was evidence that Student adjusted somewhat to Stanbridge, testimony and documentary evidence also established that Student still exhibited the need to absent herself from classes frequently on a daily basis, at which time she would seek out a counselor or trusted teacher, or just find a place to be alone. On March 3, 2009, Mother reported to Ms. Doerpinghaus at the District that Student was requiring daily visits to counseling, and visits to her psychologist once or twice a week due to stress. On March 30, 2009, Ms. Jacobsen observed Student at Stanbridge and subsequently reported to Parents that Student was still requiring 20 to 40 minutes in the Stanbridge counselor's office two to four times a week, to maintain herself emotionally. This information was confirmed by Stanbridge personnel who testified at the hearing.

69. Based on the foregoing, the evidence established that the District's offer met Student's unique needs and enabled Student to be educated with her typically developing peers instead of being isolated at a separate school with only pupils who had disabilities. The evidence established that Stanbridge was a more restrictive setting for Student than the District's proposed placement. Student did not establish that she needed the more restrictive setting. Accordingly, the District's offer of placement and services was an offer of FAPE from January 23, 2009, to the end of the 2008-2009 school year. The evidence did not establish that Student required placement at Stanbridge to receive a FAPE.

#### *Baselines and annual goals*

70. An IEP must contain a statement of the present performance of the student, a statement of measurable annual goals designed to meet the student's needs that result from the disability, and a description of the manner in which progress of the student towards meeting the annual goals will be measured. Student contends that the District did not establish accurate baselines, and did not provide her with a statement of annual goals designed to meet her needs, that were measurable, and which Student had a reasonable chance of attaining within a year.

71. Student's baseline levels of academic and functional performance in the January 22, 2009 and February 5, 2009 IEP documents were established from the assessments performed by District personnel in December 2008 and January 2009, as well as input from Student's teachers. The annual goals were formulated by Ms. Foster, Ms. Johns and Ms. Geller. Ms. Geller formulated two speech and language goals to address Student's deficits in pragmatic language and ability to understand inferences, and Ms. Foster and Ms. Johns formulated the remaining three academic goals. One of the academic goals dealt with Student's deficits in math, and another with her deficits in executive functioning. Another academic goal, noted as a writing goal, also had some executive functioning aspects. Although Ms. Jacobsen criticized the District's goals, she was unable to provide a clear explanation of why they were flawed, and could not provide any alternative examples. The evidence established that the drafted goals were measurable, were based on Student's present

levels of performance, and were designed to meet her needs. Therefore, the evidence established that the District proposed annual goals that met the legal requirements, and offered Student a FAPE.

## APPLICABLE LAW AND LEGAL CONCLUSIONS

### *Burden of Proof*

1. Under *Schaffer v. Weast* (2005) 546 U.S. 49 [126 S.Ct. 528], the party who files the request for due process has the burden of persuasion at the due process hearing. Student filed the request for due process, and therefore has the burden of persuasion in this matter.

### *Elements of a FAPE*

2. Under both the federal IDEA and state law, students with disabilities have the right to a FAPE. (20 U.S.C. § 1400; Ed. Code, § 56000.) A FAPE means special education and related services that are available to the student at no charge to the parent or guardian, that meet the state educational standards, and conform to the student's IEP. (20 U.S.C. § 1401(9).) A child with a disability has the right to a FAPE under the IDEA and California law. (20 U.S.C. § 1412(a)(1)(A); Ed. Code, § 56000.)

3. In *Board of Education of the Hendrick Hudson Central School District v. Rowley* (1982) 458 U.S. 176 [102 S.Ct. 3034], hereafter *Rowley*), the United States Supreme Court addressed the level of instruction and services that must be provided to a student with a disability to satisfy the requirements of the IDEA. The Court determined that a student's IEP must be reasonably calculated to provide the student with some educational benefit. The IDEA does not require school districts to provide the student with the best education available or to provide instruction or services that maximize a student's abilities. (*Id.* at pp. 198-200.) The Court stated that school districts are required to provide only a "basic floor of opportunity" that consists of access to specialized instructional and related services that are individually designed to provide educational benefit to the student. (*Id.* at p. 201; *J.L. v. Mercer Island School Dist.* (9th Cir. 2009) 575 F.2d 1025, 1035-1038.)

4. There are two parts to the legal analysis of a school district's compliance with the IDEA. First, the tribunal must determine whether the district has complied with the procedures set forth in the IDEA. (*Rowley, supra*, 458 U.S. at pp. 206-207.) Second, the tribunal must decide whether the IEP developed through those procedures was designed to meet the child's unique needs, and was reasonably calculated to enable the child to receive educational benefit. (*Ibid.*) An IEP is not judged in hindsight; its reasonableness is evaluated in light of the information available at the time it was implemented. (*JG v. Douglas County School Dist.* (9th Cir. 2008) 552 F.3d 786, 801; *Adams v. State of Oregon* (9th Cir. 1999) 195 F.3d 1141, 1149.)

5. In *Rowley*, the Supreme Court recognized the importance of adherence to the procedural requirements of the IDEA. (*Rowley, supra*, 458 U.S. at pp. 205-06.) However, a procedural error does not automatically require a finding that a FAPE was denied. Since July 1, 2005, the IDEA has codified the pre-existing rule that a procedural violation results in a denial of FAPE only if it impedes the child's right to a FAPE, significantly impedes the parents' opportunity to participate in the decision-making process regarding the provision of a FAPE to the parents' child, or causes a deprivation of educational benefits. (20 U.S.C. § 1415(f)(3)(E)(ii); see, *W.G. v. Board of Trustees of Target Range School Dist. No. 23* (9th Cir. 1992) 960 F.2d 1479, 1484.)

#### *Determination of Issues*

*Did the District deny Student a FAPE by failing to fulfill its child find obligations from May 21, 2007 through January 22, 2009?*

6. Under IDEA and California law, a school district has an affirmative, continuing obligation to identify, locate, and evaluate all children with disabilities residing within its boundaries. (20 U.S.C. § 1412(a)(3); Ed. Code, § 56300 et seq.) The duty is not dependent on any action or inaction by parents; the district must "actively and systematically seek out all individuals with exceptional needs ... who reside in the district." (Ed. Code, § 56300.) In addition, the district must develop and implement "a practical method" to locate those individuals. (Ed. Code, § 56301.)

*May 21, 2007 to the end of the 2006-2007 school year*

7. Factual Findings 2 through 7 establish that the District did not violate its child find obligations from May 21, 2007 through the end of the 2006-2007 school year. The accommodations the District was providing to Student by way of the December 6, 2005 SST plan were sufficient to enable her to make academic progress during this time period. Student received only one grade of C+, and the remainder of her grades were As and Bs. In addition, because Parents never provided the District with the 2005 Tsou report, or any other reports or assessments, the District had no notice of Dr. Tsou's medical diagnosis or recommendations in that report. Finally, the evidence did not establish that Parents requested an IEP, or that Student be assessed during this time period. Because they already had another child who had been under an IEP since 2000, Parents were aware of the process for requesting an IEP or assessment. Accordingly, the District did not violate its child find obligations from May 21, 2007 through the end of the 2006-2007 school year.

*2007-2008 school year*

8. As established by Factual Findings 8 through 18, the District met Student's needs during the 2007-2008 school year. An SST was convened October 19, 2007. When Mother notified the school with her concerns that Student was anxious about school, and having problems at home related to school, the District convened another SST meeting on March 10, 2008, and a 504 Plan was formulated for Student. Again, there was no evidence

that Parents provided the District with the 2005 Tsou report, or another other reports or assessments during this school year that might have put the District on notice that Student needed to be assessed for special education. Although an IEP was discussed at the SST meeting in March 2008, the team opted to formulate a 504 Plan and that decision was appropriate based on the information the District had. The teachers followed the modifications in that plan, and the modifications were successful. Student ended the school year with two A grades, two B grades, and 2 C grades. The three teachers who testified about Student's performance in their classes that school year were persuasive that she understood the grade-level curriculum and was an active participant in class.

9. During the 2007-2008 school year, Factual Findings 8 through 18 establish that Student did experience anxiety that year about school, at home in the afternoon and evening. When Mother contacted Student's school counselor, Ms. Garlick, with this information, Ms. Garlick checked with Student to ensure that she was not feeling overwhelmed. On the one or two occasions when Student was feeling anxious at school, Ms. Garlick assisted Student with devising a plan of action, and Student responded positively. On occasion Student spontaneously left a class to check in with Ms. Garlick. On March 26, 2008, Dr. Tsou wrote a letter to Parents recommending that Student receive a mental health referral for an evaluation due to school anxiety. However, the evidence established that Parents did not provide the District with a copy of this letter until the following school year. Therefore, the District did not have notice of new information about Student's problems. Based on Legal Conclusion 6, and Factual Findings 8 through 18, and 32 through 33, the District did not fail to meet its child find obligations for the 2007-2008 school year.

*Summer of 2008 to January 22, 2009*

10. Factual Findings 19 through 31 establish that Student became more emotionally fragile in the home setting this school year and the preceding summer. An SST meeting was held before the school year began on August 21, 2008 to add further modifications to Student's 504 Plan. The evidence established that Mother contacted Ms. Garlick when Student was exhibiting troubling behavior in the home the previous day, or earlier in the morning. The evidence established that Student generally did not seem troubled when Ms. Garlick would then check in with Student. Student's teachers found her to be capable of working at grade level, and she was an active participant in class. When the teachers graded her for the first trimester, taking into account the modifications from the most recent 504 Plan, Student had grades of two Bs, two Cs and a grade of Pass in a class where she was a teacher's peer aide.

11. Evidence established, based on Factual Findings 19 through 33, that the District did not fail to meet its child find obligations from the summer of 2008 to January 22, 2009. Parents did not provide the District with any previous reports or assessments of Student until the SST meeting on November 18, 2008, at which time Mother provided Ms. Foster with Dr. Tsou's letter of March 26, 2008. In addition, Parents did not request an assessment or IEP during this time period. Student was not having serious problems in school, nor were her problems at home so severe that Parents were contacting the school on a

daily basis. When Mother reported that Student was seeing a therapist, Ms. Garlick made several attempts to obtain a release to talk to Student's private providers. However, Parents did not facilitate this contact. Based on the foregoing, the evidence did not establish that the District failed to meet its child find obligations from the summer of 2008 to January 22, 2009.

*Did the District deny Student a FAPE from May 21, 2007 through November 18, 2009, by failing to assess Student in all areas of suspected disability until November 18, 2008; by failing to find Student eligible for special education services; by failing to offer Student an educational placement and services that would meet her unique needs; and by failing to prepare measurable goals in all of Student's areas of need?*

12. As established by Factual Findings 7, 18, 31 through 33, and 37 through 40, the District did not fail to meet its child find obligations. Accordingly, it had no obligation to provide Student with a FAPE from May 21, 2007 to January 22, 2009.

*Did the District deny Student a FAPE from May 21, 2007 through January 22, 2009, by failing to make a referral for a mental health assessment and services for Student?*

13. Pursuant to the regulations implementing Chapter 26.5 of the Government Code, which governs mental health referrals, "mental health assessment" means "a service designed to provide formal, documented evaluation or analysis of the nature of the pupil's emotional or behavioral disorder" that is conducted by qualified mental health professionals in conformity with Education Code sections 56320 through 56329. (Govt. Code § 7576; Cal. Code Regs., tit. 2, § 60020, subd. (g).) An IEP team may initiate a referral to community mental health services for a special education student who is suspected of needing mental health services, if the student meets all of the criteria specified in Government Code section 7576, subdivision (b), and California Code of Regulations, title 2, section 60040, subdivision (a). A student referred for a mental health assessment must have an IEP.

14. As established by Factual Findings 34 through 36, the District made a referral for mental health services on January 9, 2009, but it had no obligation to do so. Therefore, Student did not establish that the District failed to make a referral and because the District had no obligation to provide a FAPE to student, there was no denial of FAPE on this ground.

*Did the District deny Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year, by failing to properly assess Student in all areas of suspected disability?*

15. A school district's assessments shall be conducted by trained and knowledgeable personnel, except that individually administered tests of intellectual or emotional functioning shall be administered by a credentialed school psychologist. (Ed. Code, § 56320, subd. (b)(3).) In conducting an assessment, a district must use a variety of assessment tools and strategies to gather relevant functional, developmental, and academic

information about the student. This may include information provided by the parent that may assist in determining whether the student is a child with a disability, and the content of the student's IEP, including information related to enabling the child to be involved and progress in the general education curriculum. (34 C.F.R. § 300.304(b)(1)(i), (ii) (2006).) No single measure or assessment shall be used as the sole criterion for determining whether a student is a child with a disability or for determining an appropriate educational program for the student. (34 C.F.R. § 300.304 (b)(2) (2006).) Tests and assessment materials must be validated for the specific purpose for which they are used; must be selected and administered so as not to be racially, culturally or sexually discriminatory; and must be provided and administered in the student's native language or other mode of communication unless this is clearly not feasible. (Ed. Code, § 56320, subd. (a); 20 U.S.C. § 1414(b)(2), (3); 34 C.F.R. § 300.304(c)(1)(i), (ii) (2006).)

16. Factual Findings 41 through 53 support a finding that the District complied with the statutory criteria for assessing Student. Student's expert witness, Dr. Ambler was not persuasive that Ms. Foster should have used additional instruments to assess Student. A school district's assessments for special education are based on educational, not medical or other criteria, and are less comprehensive than a neuropsychological assessment. The evidence also established that Ms. Johns's assessment of academic achievement also met all the regulatory criteria. The District's personnel were qualified to conduct assessments they conducted, a variety of assessment tools were used, the assessment tools were validated for the specific purpose for which they were used and were selected and administered so as not to be racially, culturally or sexually discriminatory. Therefore, they met all of the statutory requirements for a school-based assessment for special education. The evidence did not establish that Student also needed a neuropsychological assessment to determine if she was eligible for special education, and to assist the IEP team to formulate an appropriate IEP. Student was not denied a FAPE on the grounds that the District failed to conduct a proper assessment because the evidence established that it did conduct a proper assessment.

*Did the District deny Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year, by failing to make a complete referral for mental health services?*

17. As established in Factual Findings 35 through 36, and 54 through 55, the District did make a referral to DMH on January 9, 2009, but the District could not make a complete referral after January 22, 2009, because Student did not have an IEP, which needed to be sent with the referral. The evidence did not establish that the District failed to make a complete referral for a mental health assessment, because it was unable to do so without an IEP.

*Did the District deny Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year, by failing to find Student eligible for special education services under the qualifying condition of autistic-like characteristics?*

18. California Code of Regulations, title 5, section 3030, subdivision (g), describes the criteria for determining whether a child qualifies for special education under the category of autistic-like behaviors, including but not limited to the following:

(1) An inability to use oral language for appropriate communication; (2) A history of extreme withdrawal or relating to people inappropriately and continued impairment in social interaction from infancy through early childhood; (3) An obsession to maintain sameness; (4) extreme preoccupation with objects or inappropriate use of objects or both; (5) extreme resistance to controls; (6) Displays peculiar motoric mannerisms and motility patterns; (7) Self-stimulating, ritualistic behavior.

If a student exhibits any combination of the above behaviors or other autistic like behaviors, she may be eligible for special education services under the category for autistic-like behaviors.

19. Factual Findings 56 through 59, support a finding that Student did not meet the requirements to be found eligible under the category of autistic-like behaviors. Statutory authority cannot be found to support Parents' contention that Student was denied a FAPE because the District did not propose finding her eligible for services under the category of autistic-like behaviors, if the District otherwise offered Student a FAPE. Although Student was medically diagnosed by Dr. Tsou as having AS, she also was diagnosed by Dr. Tsou and Ms. Foster as having anxiety and depression. The evidence did not establish that Student should have been found eligible under the category of autistic-like behaviors.

*Did the District deny Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year, by failing to offer Student an educational placement and services to meet her unique needs in the LRE?*

20. An IEP is an educational package that must target all of a student's unique educational needs, whether academic or non-academic. (*Lenn v. Portland School Committee* (1st Cir. 1993) 998 F.2d 1083, 1089.) The term "unique educational needs" is to be broadly construed and includes the student's academic, social, emotional, communicative, physical, and vocational needs. (*Seattle Sch. Dist. No. 1 v. B.S.*, 82 F.3d 1493, 1500 (9th Cir. 1996) [citing J.R. Rep. No. 410, 1983 U.S.C.C.A.N. 2088, 2106].)

21. For a school district's IEP to offer a student a substantive FAPE, the proposed program must be specially designed to address the student's unique needs, must be reasonably calculated to provide the student with some educational benefit, and must comport with the student's IEP. (20 U. S.C. § 1401(9).) To determine whether the District offered Student a FAPE, the focus is on the appropriateness of the placement offered by the District and not on the alternative preferred by the parents. (*Gregory K. v. Longview School Dist.* (9th Cir. 1987) 811 F. 2d 1307, 1314.) "In striving for 'appropriateness,' an IEP must take into account what was, and was not, objectively reasonable... at the time the IEP was

drafted.” (*Adams v. State of Oregon, supra*, 195 F.3d 1141, 1149, quoting *Fuhrmann v. East Hanover Board of Education*, 993 F.2d 1031, 1041 (3d Cir. 1993).)

22. Factual Findings 60 through 69 establish that the District offered Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year. Although Parents wanted Student to attend Stanbridge rather than a District middle school, Student did not establish that the District’s proposed educational placement denied her a FAPE.

23. Federal and state law require school districts to offer a program in the least restrictive environment for each special education student. (See 20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114, et seq. (2006).) A special education student must be educated with nondisabled peers “[t]o the maximum extent appropriate,” and may be removed from the regular education environment only when the nature or severity of the student’s disabilities is such that education in regular classes with the use of supplementary aids and services “cannot be achieved satisfactorily.” (20 U.S.C. § 1412(a)(5)(A); 34 C.F.R. § 300.114(a)(2)(i) & (ii) (2006); Ed. Code, § 56364.2, subd. (a).) A placement must foster maximum interaction between disabled students and their nondisabled peers “in a manner that is appropriate to the needs of both.” (Ed. Code § 56031.) The law demonstrates “a strong preference for ‘mainstreaming’ which rises to the level of a rebuttable presumption.” (*Daniel R.R. v. State Bd. of Ed.* (9th Cir. 1989) 874 F.2d 1036, 1044-1045; § 1412 (a)(5)(A); *Rowley, supra*, 458 U.S. at p. 181 n.4; *Poolaw v. Bishop* (9th Cir. 1995) 67 F.3d 830, 834.) However, the Supreme Court has noted that IDEA’s use of the word “appropriate” reflects Congressional recognition “that some settings simply are not suitable environments for the participation of some handicapped children.” (*Rowley, supra*, 458 U.S. at p. 197.)

24. In *Sacramento City Unified Sch. Dist. v. Rachel H.* (9th Cir. 1994) 14 F.3d 1398, 1400-1402, the Ninth Circuit held that the determination of whether a particular placement is the “least restrictive environment” for a particular child involves an analysis of four factors, including (1) the educational benefits to the child of placement full-time in a regular class; (2) the non-academic benefits to the child of such placement; (3) the effect the disabled child will have on the teacher and children in the regular class; and (4) the costs of educating the child in a regular classroom with appropriate services, as compared to the cost of educating the child in the district’s proposed setting.

25. Factual Findings 67 through 69 establish that the placement and services the District offered to Student would provide her with FAPE in the LRE. Student did not prove that Stanbridge was the LRE for her. Approximately 100 students attend Stanbridge in grades from kindergarten through high school. All students at Stanbridge have one or more mild to moderate disabilities. When Student attended TL, she received educational benefits while placed in regular classes. She was also an active and contributing participant in her classes. She had friends at TL, and received non-academic benefits at TL. Student did not disrupt her classes or impede the educational progress of her fellow students, and was well-liked by her teachers. Although the District’s offer contemplated that Student would be in an RSP class for three periods with other students who have disabilities, this class was on a campus with several hundred typically developing students. The evidence did not establish

that the District considered the cost of placement at Stanbridge when it determined that placement in a District school was the LRE for Student. The evidence did not establish that Student required an educational environment with only disabled students, such as that at Stanbridge, in order to receive a FAPE. Rather, the evidence established that the District's proposed placement would provide Student with educational benefit in the LRE.

*Did the District deny Student a FAPE from January 22, 2009, through the end of the 2008-2009 school year, by failing to report accurate baselines for goals, and prepare measurable goals in all areas of need?*

26. In developing the IEP, the IEP team shall consider the strengths of the child, the concerns of the parents for enhancing the education of their child, the results of the initial evaluation or most recent evaluation of the child and the academic, functional and developmental needs of the child. (20 U.S.C. § 1414(d)(3)(A).) For each area in which a special education student has an identified need, the IEP team must develop measurable annual goals that are based upon the child's present levels of academic achievement and functional performance, and which the child has a reasonable chance of attaining within a year. (Ed. Code, § 56344.)

27. Factual Findings 70 through 71 establish that the district provided Student with measurable goals that were reasonably achievable and addressed the specific needs of Student. On January 22, and February 5, 2009, the District proposed five goals to address Student's unique needs. These goals were based on Student's accurately reported baseline levels of academic and functional performance that were established by the District's assessments and input from her teachers. The goals addressed Student's needs in the areas of math, writing, pragmatic language and executive functioning. Therefore, the evidence established that the District formulated appropriate goals for Student that were based on accurate baselines. Accordingly, the District did not deny Student a FAPE on this basis.

#### *Remedies*

28. In general, when a school district fails to provide FAPE to a student with a disability, the student is entitled to relief that is "appropriate" in light of the purposes of the IDEA. (*Sch. Comm. of Burlington v. Dep't of Educ.* (1985) 471 U.S. 359, 369-371 [105 S.Ct. 1996, 85 L.Ed.2d 385].) Here, because the District did not deny Student a FAPE at any time, Student is not entitled to relief.

#### ORDER

All of Student's requests for relief are denied.

